

No. 48392-1-II

In the Washington State Court of Appeals, Division II

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Brian K. Maloney, Appellant,

vs.

State of Washington, Respondent.

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Amended Appellant's Opening Brief

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#### ASSIGNMENTS OF ERROR

1. The trial court erred in Conclusion of Law #1 by finding that RCW 4.84 does not apply because a petition to restore firearm rights is a criminal proceeding. CP at 35.
2. The trial court erred in Conclusion of Law #2 by finding that Mr. Maloney is not a “prevailing party” as contemplated by RCW 4.84.010 because the petition was uncontested. CP at 35.
3. The trial court erred in Conclusion of Law #3 by finding that the trial court’s order restoring Mr. Maloney’s firearm rights is not a “judgment,” as contemplated by RCW 4.84.010. CP at 35.
4. The trial court erred in Conclusion of Law #4 by applying RCW 4.84.190 instead of RCW 4.84.010. CP at 35.
5. The trial court erred in Conclusion of Law #5 by adopting the reasoning and rationale contained in the State’s response briefing. CP at 35.

#### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a petition to restore firearm rights under RCW 9.41.040(4) a civil or criminal proceeding for the purposes of RCW 4.84?
2. Is a petitioner who receives an order restoring his or her firearm rights a “prevailing party” for the purposes of RCW 4.84?
3. Is an order restoring firearm rights a “judgment” for the purposes of RCW 4.84?

#### STATEMENT OF THE CASE

In 1980, the Pierce County Superior Court convicted Mr. Maloney of burglary in the second degree. CP at 33. In 1983, the court convicted him again of attempting to elude. CP at 33 Both felonies suspended his firearm rights under state law. CP at 33. On August 27, 2015, Mr. Maloney filed a petition in the Pierce County Superior Court to restore his Washington state firearm rights. CP at 33. Court procedure forced Mr. Maloney to initiate a new civil filing, name the State of Washington as a defendant, pay a \$240 filing fee, and serve the petition on the Pierce County Prosecutor’s Office. CP at 33. The court initially assigned the matter to a specific civil judge, but later transferred the case to the presiding judge of the criminal division. CP at 34.

The Pierce County Prosecutor's Office analyzed Mr. Maloney's eligibility for restoration of his firearm rights per RCW 9.41.040(4) by checking his local and national criminal history. CP at 34. Because it found that Mr. Maloney was eligible under RCW 9.41.040(4) for restoration of his firearm rights, the prosecutor's office did not object to the petition. CP at 34. Cort O'Connor, a deputy prosecuting attorney, prepared an agreed order. CP at 34. Both Mr. Maloney's attorney and Mr. O'Connor signed the order, after which the criminal division presiding judge signed the order on September 29, 2015. CP at 35.

Although the prosecutor's office did not object in this instance, the record is clear that service of the petition on the prosecutor's office is required, that the prosecutor's office does an independent inquiry into the petitioner's eligibility, and that it advises the court accordingly. In those instances where the prosecutor's office determines that the petitioner is not eligible for restoration, the prosecutor's office formally objects to the petition. CP at 34.

On November 20, 2015, the criminal division presiding judge heard argument from Mr. Maloney on his motion for an award of costs for the filing fee plus \$200 statutory attorney fee per RCW 4.84 and CR 54. CP at 35. The court denied that motion. CP at 35. Mr. Maloney filed this timely appeal. CP at 32.

## ARGUMENT

**A. Mr. Maloney is entitled to costs as a matter of law under RCW 4.84.010 and CR 54. Therefore, this Court should reverse the trial court's denial of costs and enter an award in Mr. Maloney's favor of \$440.**

RCW 4.84.010 states that "there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses: (1) Filing fees; . . . (6) Statutory attorney and witness fees . . . ." RCW 4.84 applies only to civil actions. *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989). CR 54(d)(1) states: "Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute." Here, Mr. Maloney's petition to restore his firearm rights is a civil action in which he prevailed by receiving a judgment that restored his firearm rights. Mr. Maloney has met all of the statutory requirements and he is entitled to costs under RCW 4.84 and CR 54 as a matter of law.

### 1. A petition to restore firearm rights is a civil action.

The record is clear that Pierce County Superior Court procedures mandate that a petitioner file a petition to restore firearm rights as new civil cause of action, pay a \$240 filing fee, and serve the petition on the Pierce County Prosecutor's Office. To the extent that CR 3 mentions the

initiation of a civil action by way of summons and complaint, nothing in CR 3 suggests that a summons and complaint is the exclusive manner of initiating a civil action. Additionally, the petition for firearms and service upon the prosecutor's office are sufficiently akin to a summons and complaint. Both set forth the facts and circumstances lending to a claim for relief, satisfy the due process notice requirements, and are accompanied by a filing fee.

2. A petition to restore firearm rights is not a criminal proceeding.

Although parts of RCW 9.41.040 are certainly criminal in nature, the entire statute is not exclusively criminal, and there is no authority to suggest that a statute cannot have both criminal and civil components.

RCW 9.01.120, part of the "Crimes and Punishments" title, states:

The omission to specify or affirm in this act any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, shall not affect any right to recover or enforce the same.

Although not directly on point, the statute shows the legislature's intent that there remains an intersection between criminal and civil proceedings and that not everything in Title 9 is relegated exclusively to the criminal realm.



Furthermore, there are other statutory schemes that comprise both civil and criminal attributes. For example, RCW 26.50, titled “Domestic Violence Prevention” includes both civil remedies and criminal sanctions. Specifically, RCW 26.50.110 states that violation of a protection order could subject an individual to both criminal charges and civil contempt penalties. But, most telling is that RCW 9A.04.040 and RCW 9A.04.047 allow for restoration of firearm rights following an involuntary commitment. Surely, a petition to restore firearm rights for a previous involuntary commitment is not a criminal proceeding. Neither is a petition to restore firearm rights for a previous conviction.

Finally, there is no authority that an individual member of the public can initiate any sort of criminal proceeding. All authority and conventional wisdom points to the fact that only a prosecuting authority may initiate a criminal proceeding. RCW 36.27.020 states that the prosecuting authority shall “[p]rosecute all criminal and civil actions in which the state or the county may be a party.” *Accord State v. St. Clair*, 21 Wn.2d 407, 415, 151 P.2d 181 (1944) (“[I]t is made the duty of prosecuting attorneys to prosecute all criminal actions to which the state or his county may be a party.”).

3. Mr. Maloney prevailed on this petition to restore his firearm rights.

Mr. Maloney filed a petition to restore his firearm rights and he prevailed when the trial court signed an order restoring his firearm rights.

4. The court order restoring Mr. Maloney's firearm rights is a judgment.

CR 54(a)(1) states: "A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies." The order restoring Mr. Maloney's firearm rights is a judgment because it is the court's final determination of the rights (to possess firearms) of a party (petitioner) in a case. If the court granted or denied a contested petition, the offended party could seek an appeal from that grant or denial.

Mr. Maloney filed (1) a civil action, (2) arising out of a civil provision of a mixed motive statute, (3) in which he prevailed by having his firearm rights restored via (4) a judgment to that effect. All of the requirements of RCW 4.84.010 are met and Mr. Maloney is entitled to an award of costs as a matter of law.

**B. Mr. Maloney is entitled to costs on appeal.**

RAP 18.1 and RAP 14.3 allow for costs to the prevailing party on appeal, including filing fees, statutory attorney fees, and copies. In

addition to the \$440 (\$240 filing fee + \$200 statutory attorney fee) Mr. Maloney requests for the proceedings below, Mr. Maloney requests another award of costs in an amount to be determined after he prevails.

#### CONCLUSION

Because Mr. Maloney is entitled to an award of costs for prevailing on his petition to restore his firearm rights, and because he is also the prevailing party on appeal, the Court should reverse the trial court and enter an award of costs in his favor.

Respectfully submitted,

/s/

Vitaliy Kertchen #45183  
Attorney for Mr. Maloney  
March 22, 2016

AFFIDAVIT OF SERVICE

I, Vitaliy Kertchen, being of sound age and mine, declare that on March 22, 2016, I served this document (Appellant's Opening Brief) on the Pierce County Prosecutor's Office by uploading it to the Court of Appeals, Division II using the Court's COA2 e-filing application and emailing a copy of the document using that process to [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us).

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,

/s/

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Vitaliy Kertchen #45183  
Attorney for Mr. Maloney  
Date: 3/22/16  
Place: Tacoma, WA

**KERTCHEN LAW, PLLC**

**March 22, 2016 - 9:26 AM**

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